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# Supreme Court of the United States

**OCTOBER TERM, 1940**

314-638

**No. 164**

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

*vs.*

RICHARD F. WILD

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.**

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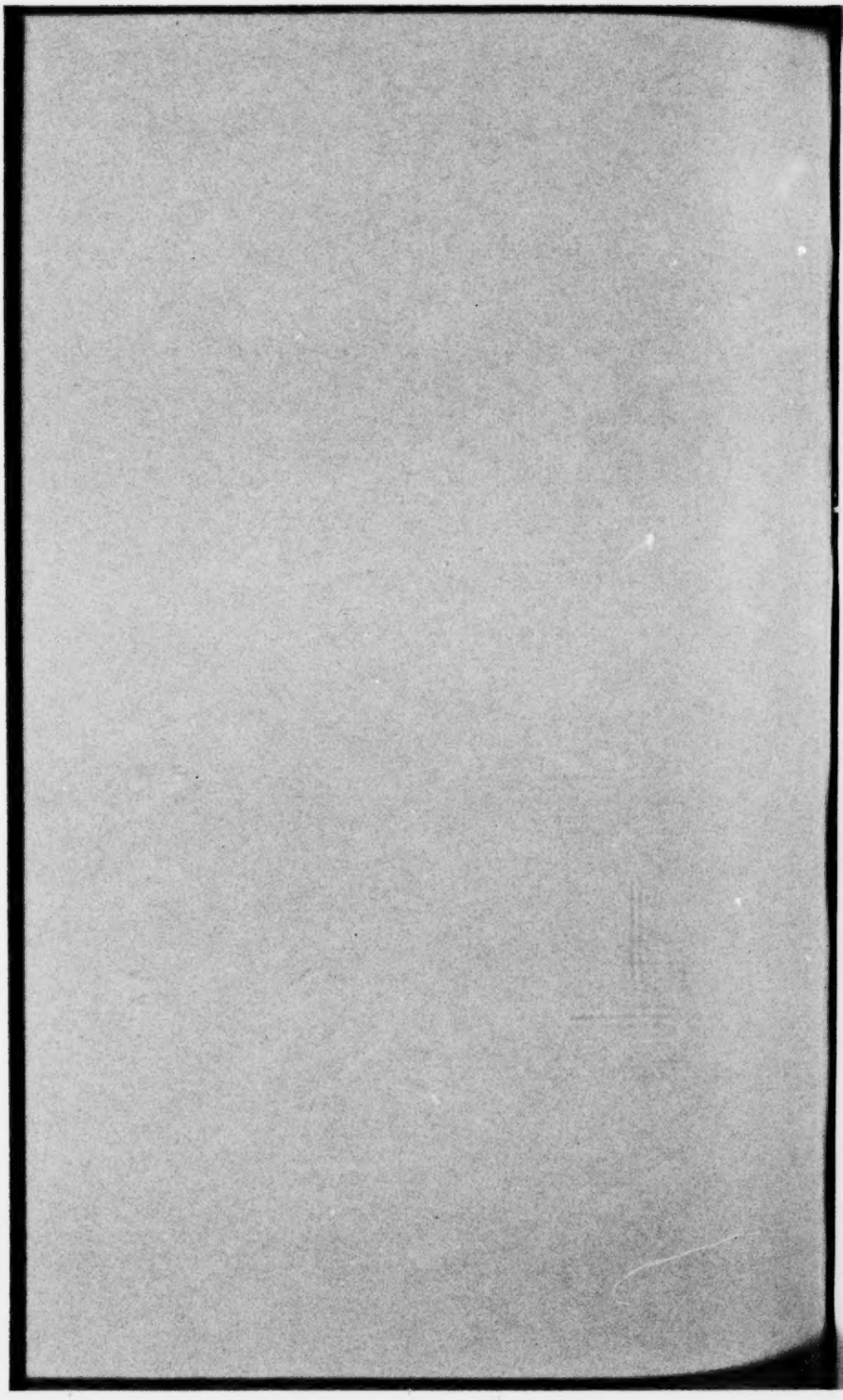

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NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

*vs.*

RICHARD F. WILD

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, a cor-

poration, duly appointed and acting as such Receivers under the decree and orders of the United States District Court for the Eastern District of Missouri, Eastern Division, respectfully pray that a writ of certiorari issue out of this Court directed to the Supreme Court of Missouri to review the judgment of the Supreme Court of Missouri, Division Number One, in the case of Richard F. Wild, Respondent, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, Appellants.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

The judgment of the Supreme Court of Missouri, which the petitioners seek to have reviewed, was entered in Division Number One of that Court and determined rights set up and claimed by the plaintiff, which were sustained by the State Court, and immunities set up and claimed by the defendants, which were denied by the State Court, under the Federal Employers' Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code), and the Federal Safety Appliance Act of April 14, 1910 (Sections 11 to 15, inclusive, of Chapter 1, Title 45, United States Code). The decision became and is the final judgment of the highest court of Missouri by reason of the overruling by that Court on April 18, 1941 (R. 373), of appellants' (petitioners') motion to transfer the cause to the court en banc. The opinion of Division Number One of the Court was filed on February 14, 1941 (R. 335), and provided that the judgment of the Circuit Court of St. Louis, for $20,000, would be

[NOTE.—Pertinent sections of the Federal Employers' Liability Act; the Federal Safety Appliance Act of April 14, 1910, Sections 11 to 15, Title 45 U. S. Code; Provisions of Missouri Constitution; and Rules 21 and 24 of Missouri Supreme Court appear in Appendix.]

affirmed if the plaintiff (respondent) would enter in said Supreme Court a remittitur of $5,000, within ten days, otherwise the judgment would be reversed and the cause remanded (R. 335, 348). The respondent (plaintiff) filed the remittitur required on February 20, 1941 (R. 349), and on the same day the Court, Division Number One, entered a judgment affirming the judgment of the Circuit Court for $15,000 (R. 350). The appellants (petitioners) on February 24, 1941 (R. 350, 351-355), filed their motion for a rehearing (R. 350, 351) and suggestions in support (R. 346), within ten days after the opinion of Division Number One of the Court was filed, as provided by Rule 21 of the Rules of the Missouri Supreme Court. The appellants' motion for a rehearing was overruled on March 13, 1941 (R. 364), and on March 22, 1941, appellants (petitioners) filed in Division Number One of the Court their motion to transfer the cause to the Court en banc (R. 364, 365-368), on the ground that Federal questions were involved within the meaning and provisions of Section 12 of Article 6, and Section 4 of the Amendment of 1890 to Article 6, of the Constitution of Missouri, as provided by Rule 24 of the Missouri Supreme Court. The Division Number One on April 18, 1941, overruled appellants' (petitioners') motion to transfer the cause to the court en banc (R. 373) and thereupon the judgment of the Court became the final judgment and decision of the state court of last resort on that day, April 18, 1941.

The opinion in the case has not been officially reported, but appears as Wild vs. Pitcairn, in 149 South Western Reporter, Second Series, page 800. It is in the Transcript of Record at pages 336 to 348, inclusive.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937; 28 United States Code,

Sec. 344 (b), and Rule 38 of the Rules of the Supreme Court of the United States, on the ground that real and substantial Federal questions were and are involved in said cause and were directly presented to and decided by the State Court, in that the plaintiff specially set up and claimed a right under the Federal Employers' Liability Act and the Federal Safety Appliance Act to compensatory damages for injuries received and his Federal claim was sustained, and defendants specially set up and claimed immunity from liability under said acts, and their claim was denied. The Federal questions are not merely colorable and the petitioners believe that they have not been heretofore decided by this Court.

The cause was commenced in the Circuit Court of the City of St. Louis, Missouri, on August 15, 1938, by Richard F. Wild to recover for personal injuries received by him while employed by the petitioners as a switchman at St. Louis, Missouri, on February 18, 1938. The plaintiff's ground for recovery was that he was injured while engaged in interstate commerce by falling from a car and that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes of the United States (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States, made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake" (R. 3).

The petition (R. 3) also alleged that the defendants were the duly appointed Receivers of Wabash Railway Company and were at all times mentioned in the petition in charge of and operating the properties and equipment of Wabash Railway Company as a common carrier and engaged in interstate commerce and transportation by railroad; that

on and prior to February 18, 1938, plaintiff was "working as a switchman in, upon and about defendants' cars, trains and locomotives on the line of defendants" and on said day was working as such employee "in, upon and about trains and cars which were then and there being hauled, used, moved, transported and classified on defendants' lines in the defendants' Luther Avenue yard in the City of St. Louis, Missouri, and in the furtherance of interstate commerce and transportation by railroad, and while plaintiff was engaged in the furtherance of interstate transportation and commerce by railroad, plaintiff was upon a box car and did attempt to operate a handbrake thereon; that said handbrake was inefficient and did suddenly, violently, and unexpectedly spin, turn, twist, revolve, vibrate and chatter, directly thereby causing plaintiff to be thrown from said box car to the ground and to sustain the injuries hereinafter more particularly alleged, all of which directly and proximately resulted from defendants' failure to perform their duty, under the Statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided to have said box car equipped with an efficient handbrake."

The petition then alleged that "as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States and the aforesaid orders, rules and regulations of said Interstate Commerce Commission" that is, to have the Louisville and Nashville Company's car, which defendants had just received from that railroad and from which car the plaintiff fell and was injured, equipped in accordance with such regulations, he received the injuries complained of.

The answer of the defendants admitted that they were the Receivers of Wabash Railway Company and were operating trains as common carriers in interstate commerce, and denied every other allegation of the petition (R. 4, 5).

On the voir dire examination of the jury the Court over defendants' objection ruled that plaintiff was not required to prove that the handbrake was defective, but was only required to show that it did not operate (R. 9). The Supreme Court of Missouri, Division Number One, approved this ruling of the Circuit Court (R. 338).

The evidence at the trial showed that plaintiff Wild was injured about 6:40 p. m. February 18, 1938, when he fell from Louisville & Nashville Railroad Company's car 12670 while employed as a switchman in the Luther Avenue yards of the Wabash Railway in St. Louis, Missouri.

The Louisville & Nashville car 12670 containing an interstate shipment of freight, arrived on the afternoon of February 18th at East St. Louis, Illinois, to which point it had been hauled by the Louisville & Nashville Railroad (and there delivered to the Terminal Railroad Association). It was hauled from East St. Louis, Illinois, to St. Louis, Missouri, by the Terminal Railroad Association and at 6:15 p. m. was placed by that carrier with other cars on the delivery track of the Wabash in the Luther Avenue yards to be inspected by the Wabash and accepted if no defects were found. The car was there inspected by Wabash inspectors and no defects were found. It was then taken a short distance by a switch crew, of which Wild was a member, to the switch yards of the Wabash to be placed on a track with other cars to leave St. Louis in a train about 8:00 p. m. and hauled by the Wabash to a point in Iowa (R. 22, 23, 24, 213, 214, 215, 218, 220, 241, 242, 245).

The car, Louisville and Nashville 12670, was cut off from other cars being classified in the switch yard and moved

southward on a slightly downgrade track. The handbrake on the car Louisville and Nashville 12670 as it moved southward was on the north end of the car at the right of the center of the car (see Defendants' Exhibits 10 and 11, facing R. pp. 125, 126). The plaintiff climbed to the brake platform on the north end of the car shown in Defendants' Exhibit 10, and stood upon the platform facing to the south to set the brake to retard the movement of the car.

Defendants' Exhibits 10, 11 and 12 are photographs of the car in question, Louisville and Nashville 12670, which were taken the morning after the injury and while the car remained in the Luther Avenue yards. In the photograph, Exhibit 10, the brake staff is designated by the figure 1. The dog or pawl is designated by the figure 2. One end of it meshes in the cogs of the ratchet wheel, marked by the figure 3, when the brake wheel is turned and sufficient pressure is applied at the other end of the pawl. The brake staff was square where it fitted into the square hole in the ratchet wheel. The ratchet wheel rested upon a metal plate or trunnion, bolted to the upper side of the platform. On the end and opposite the end where the pawl was placed, was a guard, marked by the figure 4, which extended over the edge of the ratchet wheel and held it in place between the metal plate or trunnion on which it rested and underside of the guard (R. 85, 86).

It had been raining and the brake platform on which plaintiff stood was wet and sleety (R. 87, 104), at the time plaintiff fell from the car, and he wore chamois skin gloves and rubber overshoes at the time (R. 104). He testified that he turned the brake wheel clock-wise or from left to right and felt that the brake chain was tightening on the brake staff (see Defendants' Exhibit 11, facing R., page 126 and Defendants' Exhibit 12, facing R. page 164). He pressed

his foot against the dog or pawl, marked with figure 2 on Defendants' Exhibit 10, and as he turned the brake wheel from left to right and every time he turned the brake wheel he heard the dog clicking in the cogs of the ratchet wheel as it turned when he turned the brake wheel and shaft. He testified that when the dog is clicking in the ratchet wheel it is holding (R. 13, 87, 104, 108). He testified he gave the brake wheel three or four turns and it suddenly revolved in the reverse direction, that is, from right to left, and he fell from the car and was injured, his left arm being fractured at the elbow joint. Immediately after plaintiff fell, the foreman of the switch crew, who was near the car while the plaintiff was setting the brake, went onto the brake platform to get the plaintiff's lantern which he had left there when he fell and found that the brake was set with the end of the dog firmly meshed in the cogs of the ratchet wheel. He then examined the lower end of the brake staff and the brake chain and found that the brake chain was wound around the lower end of the brake staff (see Defendants' Exhibit 11, R. 126, and Defendants' Exhibit 12, R. 164). (R. 272, 273, 276, 278.)

Within a few minutes after the accident two car inspectors employed by the petitioners examined the car and found that the brake was set and that it was in proper working condition when they released it and set it again. A few hours after the injury, the Superintendent and Train Master of the petitioners inspected the car and found that there were no defects and nothing about the brake that was inefficient. The car was held in the yards and on the following morning was given a complete examination by the Yard Master, a car repairer and the General Car Foreman, and they then found that the brake and brake equipment were in perfect condition and complied with all the requirements of the Interstate Commerce Commission reg-

ulations and no repairs were made or needed on the car. (R. 244, 245, 246, 254, 255, 257, 260, 261, 262, 266, 267, 268, 269.)

The plaintiff proved on cross examination of the switch foreman, Erting, that he heard the brake grab and "squealing" after plaintiff got on the car to set the brake (R. 284, 285). The plaintiff on rebuttal then proved over defendants' objections and exceptions that a flat place on the car wheel, even though less than two and a half inches long, which was the minimum size noted by car inspectors (R. 253), would chatter the brake-shoe and the whole hand-brake rigging, causing the brake-shoe to climb or rise on the wheel, put it out of its proper alignment and cause it to make a pronounced noise so "that you can hear the squeal of it when it is going by you" (R. 306, 308).

The plaintiff also proved over defendants' objections and exceptions that after an accident occurs you cannot make a test when the car is motionless so as to determine whether a flat place on a car wheel would cause the knocking noise, or "chattering", and might permit the brake-shoe to climb or raise on the wheel (R. 308, 309).

The plaintiff also proved on rebuttal over defendants' objections and exceptions that "chattering" is a common term used among switchmen and is a quivering of a brake-shoe caused, probably, by a flat place or a roughness of the surface of the wheel (R. 310).

The jury returned a verdict for the plaintiff for $20,000 and judgment was rendered thereon for that amount. The petitioners (defendants) appealed to the Supreme Court of Missouri and Division Number One of that court affirmed the judgment of the Circuit Court upon condition that the plaintiff, within ten days, enter a remittitur of $5,000 (R. 348). The remittitur was entered and the judgment of the Supreme Court, Division Number One, was entered on

February 20, 1941. The petitioners in due time and within ten days thereafter, filed their motion for rehearing in accordance with the rules of the Supreme Court of Missouri. The petitioners' motion for rehearing was overruled by an order of the Court entered on March 13, 1941 (R. 364). Thereafter and on March 22, 1941, and within the time allowed and provided by the rules of the Court, the petitioners (appellants) filed in said cause their motion to transfer the cause to court en banc (R. 364), which motion to transfer to the court en banc was by the Court overruled on April 18, 1941 (R. 373), and upon the overruling of the motion of the petitioners to transfer the case from Division Number One to the court en banc, the judgment of Division Number One of the Supreme Court of Missouri became the final judgment of the court of last resort of the State.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The petitioners believe there are special and important reasons for a review by the Supreme Court of the United States of the judgment and decision of the Supreme Court of Missouri, upon which they rely for allowance of the writ of certiorari, as follows, to-wit:

1. The Federal Safety Appliance Act, upon which this suit was based, the Act of April 14, 1910, now Sections 11, 12, 13, 14 and 15 of Chapter 1, Title 45, United States Code, only makes it unlawful for any common carrier "to haul, or permit to be hauled, or used on its line, any car subject to the provisions of this chapter not equipped with appliances herein provided for". The plaintiff's petition in this case (R. 3) alleged and based the right to recover on the

allegation that plaintiff's injuries "directly and proximately resulted from defendants' failure to perform their duty, under the statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake". The petition then alleged: "Plaintiff further states that, as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission", plaintiff sustained the injuries sued for.

The state courts erroneously interpreted and applied the provisions of the Federal Statutes by holding that the plaintiff was entitled to recover in this action for hauling the car with a handbrake alleged to have been deficient, when the petition was based upon the failure of these defendants to have the car of the Louisville and Nashville Railway Company equipped with an efficient handbrake. The state courts affirmed the judgment based upon a cause of action stated in plaintiff's petition, which alleged and sought a recovery upon a state of facts not made unlawful by the provisions of the Federal Safety Appliance Act. The mere existence of "inefficient brakes" on a car is no violation of the statute pleaded, and did not authorize a recovery in this suit. The plaintiff was not entitled to recover for failure of the petitioners to equip the Louisville & Nashville car.

2. The state court erroneously ruled that the plaintiff was entitled to recover although the handbrake was not defective and thereby erroneously interpreted and applied

the provisions of the Federal Safety Appliance Act relating to handbrakes, approved April 14, 1910 (Sections 11 to 15, inclusive, of Chapter 1 of Title 45, United States Code), whereas the statute seems clearly to provide that liability for violation of the Act is conditioned upon proof and finding that the equipment alleged to have caused the injury was defective at the time. Sections 3 and 4 of the Act (Title 45 U. S. Code, Sections 13 and 14) show that Congress intended only to make unlawful the using of a car which had a defective equipment.

The state court erred in approving the statement of counsel for the plaintiff on voir dire examination of the jury, to-wit: "We are not required to prove any defect; we simply prove it didn't operate" (R. 9)., and by the giving of plaintiff's instruction number one which authorized the jury to return a verdict for plaintiff without requiring a finding from the evidence that the handbrake equipment was defective (R. 315, 316).

The State Supreme Court (R. 338) erroneously interpreted and applied the provisions of the Federal Safety Appliance Act by holding that the plaintiff was entitled to recover without proof and a finding by the jury that the handbrake was defective.

3. The state court erred in holding that the plaintiff was entitled to recover under his allegation that his injury "directly and proximately resulted from defendants' failure to perform their duty under the statutes * * * and the orders, rules, and regulations of the Interstate Commerce Commission of the United States, made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake", for the reason that there was no evidence that the handbrake equipment failed in any particular to comply with

the rules, orders and regulations of the Interstate Commerce Commission, made pursuant to the requirements of the Safety Appliance Act (Section 12, Title 45, United States Code), which expressly provides that "the number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *".

4. The Federal Employers Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code) upon which the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77) provides that a common carrier shall be liable to an employee for an injury received while engaged in interstate transportation "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier **or** by reason of any **defect or insufficiency due to its negligence** in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis ours.)

The plaintiff failed to allege and prove that his injury resulted from the negligence of any of the agents or employees of the defendants, or by reason of any defect or insufficiency due to their negligence in the Louisville and Nashville car No. 12670.

The state court erroneously allowed the plaintiff to recover and affirmed the judgment of the Circuit Court although the plaintiff failed to allege and prove that he was injured as the result of any negligence on the part of any agent or employee of the defendants or by reason of

any defect or insufficiency due to their negligence in the car in question.

The suit having been brought under the Federal Employers Liability Law, and plaintiff having failed to allege and prove the conditions upon which liability would attach against these defendants because of negligence of their employees or by reason of any defect or insufficiency in the car, he is not entitled to recover in this case and the state court erroneously interpreted and applied the provisions of the Federal statutes and its judgment should be reversed.

5. The state court erred in refusing to decide this case in accordance with the latest decision of the Federal Court under the Safety Appliance Act in Grand Trunk Ry. v. Holstein, 67 F. (2d) 780, and in following earlier Federal Court decisions even though the court found it difficult to reconcile the Holstein case with earlier decisions cited by the court (R. 340).

The petitioners submit with this petition a brief which they believe supports the reasons relied on by petitioners for the allowance of the writ.

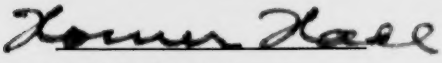
The petitioners also submit with this petition ten copies of the complete transcript of the record and proceedings in this cause in the Supreme Court of Missouri, the original copy of which is duly certified by the Clerk of said Court, and if the writ of certiorari is granted the petitioners will file in this Court the additional number of copies of such transcript of record as required by the rules of this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Missouri, directing and commanding that Court to certify

and send to this Honorable Court for its review and determination, on a day certain to be named in the writ of certiorari, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on the docket of the Supreme Court of Missouri as Number 37171, Richard F. Wild, Respondent, vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, Appellants; and your petitioners further pray that upon such review and determination by this Court the said judgment of the Supreme Court of Missouri may be reversed; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

NORMAN B. PITCAIRN and
FRANK C. NICODEMUS, Jr.,
Receivers of Wabash Railway Company, a corporation, Petitioners,

By NAT S. BROWN, and



HOMER HALL,
Counsel for Petitioners.

# Supreme Court of the United States

**OCTOBER TERM, 1940**

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## No._____

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NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, PETITIONERS,

*vs.*

RICHARD F. WILD

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.**

---

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.**

The Petitioners respectfully present to this Honorable Court the following brief in support of their petition for a writ of certiorari to the Supreme Court of Missouri:

**The Opinion of the Court Below.**

The opinion of the Supreme Court of Missouri in Division Number One in this cause has not been published in the official reports. The opinion of the Court is contained in the transcript of the record filed with the petition and appears at pages 336 to 348, inclusive. The opinion is unofficially reported as Wild v. Pitcairn et al., in 149 South Western Reporter, Second Series, at pages 800 to 806, inclusive. The opinion was handed down on February 14, 1941 (R. 335), affirming the judgment of the Circuit Court of the City of St. Louis for $20,000 upon condition that the plaintiff would enter a remittitur of $5,000 within ten days, otherwise the judgment of the Circuit Court would be reversed and the cause remanded (R. 336, 348). The judgment of the Supreme Court of Missouri became final and the decision of the highest court of the State of Missouri in which a decision could be had on April 18, 1941, by the overruling of the petitioners' (appellants') motion to transfer the cause to the court en banc under the provisions of Section 4 of the amendment of 1890 to Article 6 of the Constitution of Missouri and Rule 24 of the Supreme Court of Missouri, which Section 4 of the amendment of 1890 and said Rule 24 of the Missouri Supreme Court Rules are set out in the appendix to this brief.

**Grounds On Which Jurisdiction Is Invoked.**

The jurisdiction of this Court is invoked under the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, Title 28 United States Code, Sec. 344, and under Rule 38 of the Rules of the Supreme Court of the United States, for the reason that real and substantial Federal questions were and are involved in this cause and were directly presented to and decided by the State Court, in that the plain-

tiff specially set up and claimed a right to recover damages under the Federal Employers' Liability Act and the Federal Safety Appliance Act for injuries received while employed by defendants and his Federal claim was sustained, and defendants specially set up and claimed immunity from liability under said Federal Acts, and their claim was denied.

**The Statutes of the United States Involved.**

The plaintiff in the State court (R. 2, 3, 12, 16, 77) specially set up and claimed a right under the Federal Employers' Liability Act (Title 45, United States Code, Sections 51 to 59), and the Federal Safety Appliance Act (Title 45, United States Code, Sections 11 to 15), to compensatory damages for injuries received while in the employ of petitioners, and his claim was sustained by the State court (R. 311, 315, 338, 348, 350). The petitioners (defendants) specially claimed immunity from liability under said Acts (R. 4, 5, 22, 112, 113, 310, 311, 325, 326, 351, 356) and their claim was denied by the State court over their exceptions (R. 22, 113, 311, 327, 337, 348, 350, 364).

**Cases Sustaining Jurisdiction.**

The cases which sustain the jurisdiction of this Court to grant the writ of certiorari and to review the decision of the Supreme Court of Missouri are the following:

Minneapolis, St. Paul & Ste. Marie R. Co. v. Popplar, 237 U. S. 369.
Pryor v. Williams, 254 U. S. 43.
Missouri Pac. Ry. Co. v. Aeby, 275 U. S. 426.
Toledo, St. L. & W. Ry. Co. v. Allen, 276 U. S. 169.
New York Central Ry. Co. v. Ambrose, 280 U. S. 486.
Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44.
Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74.
Baltimore & Ohio R. Co. v. Berry, 286 U. S. 272.

The decision of the state court was directly upon and directly involved a ruling upon the meaning, scope and applicability of the Act of April 14, 1910, and this Court has jurisdiction and authority to review the ruling and decision of the state courts. St. Louis, Iron Mountain & Southern R. Co. v. McWhirter, 229 U. S. 265, loc. cit. 276.

The Supreme Court of the United States has jurisdiction for the reason that the plaintiff's asserted right to relief depends upon the construction and application of the laws of the United States, the Safety Appliance Act of April 14, 1910, and that Federal claim was not merely colorable but rests upon a reasonable foundation. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, loc. cit. 199; Southern Pacific Co. v. Berkshire, 254 U. S. 415, 416.

In Southern Pacific Co v. Berkshire, 254 U. S. 415, on writ of certiorari to the Court of Civil Appeals of the State of Texas, this Court reversed the judgment of the state court and, at page 416, said:

> "* * * a writ of certiorari was allowed by this Court, upon the ground that an immunity set up under the Federal Employers' Liability Act was involved."

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## STATEMENT OF THE CASE.

The petitioners have set out in their petition for the writ a full and concise statement of all the facts material to the consideration of the questions here presented, and in the interest of brevity and in order to avoid repetition, beg leave to refer to and rely upon the statement in the petition for the writ at pages 2 to 10.

## SPECIFICATIONS OF ERROR AND SUMMARY OF THE ARGUMENT.

1. The Supreme Court of Missouri erred in holding that plaintiff was entitled to recover under the allegations of his petition that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes of United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient handbrake," for the reason that the statute made it unlawful to haul a car not equipped with the required handbrake, but did not make it unlawful for the defendants to fail to equip the Louisville & Nashville Railroad Company's car with an efficient handbrake. The plaintiff was not entitled to recover under the statute for an act or omission which is not made unlawful by the statute.

2. The State court erred in holding that the plaintiff was entitled to recover without proving and requiring the jury to find from the evidence that the handbrake was defective.

3. The State court erred in holding that the plaintiff was entitled to recover under the allegation of his petition that his injuries "directly and proximately resulted from defendants' failure to perform their duty under the statutes * * * and the orders, rules and regulations of the Interstate Commerce Commission * * * to have said box car equipped with an efficient handbrake," for the reason that there was no evidence and the jury was not required to find that the handbrake failed in any particular to comply with the orders, rules and regulations of the Interstate Commerce

Commission. Section 12, Title 45, U. S. Code expressly provides that the number, dimensions, location and manner of application of the appliances as fixed by the Interstate Commerce Commission shall constitute the standard of equipment to be used on all cars subject to the Act and the plaintiff was not entitled to recover on the mere allegation that defendants failed to equip the car as required by the regulations of the Interstate Commerce Commission, without proof that the car was not so equipped and without requiring the jury to find from the evidence that the defendants failed to perform a duty to equip the car as required by the orders, rules and regulations of the Interstate Commerce Commission.

4. The State court erred in holding that the plaintiff was entitled to recover under the Federal Employers' Liability Act (Sections 51 to 59, Chapter 2, Title 45, United States Code), upon which the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77) without proving or the jury being required to find that plaintiff was injured as the result of "the negligence of any of the officers, agents, or employees of such carrier **or** by reason of any **defect or insufficiency due to its negligence in its cars** * * * or other equipment." (Emphasis added.)

The state court erroneously affirmed the judgment of the Circuit Court when the plaintiff failed to allege and prove that he was injured as the result of some negligence on the part of any agent or employee of the defendants or by reason of any defect or insufficiency due to their negligence in the Louisville & Nashville car in question.

The suit having been brought under the Federal Employers' Liability Law, and the plaintiff having failed to allege and prove the conditions which would create liability against these defendants for negligence or by reason

of any defect in the car, he is not entitled to recover and the state court erroneously interpreted and applied the provisions of the Federal statutes, and its judgment should be reversed.

5. The State court was required to decide this case in accordance with the latest decision of the Federal courts under the Safety Appliance Act relating to handbrakes, that is, the decision of the Sixth Circuit Court of Appeals in Grand Trunk Ry. v. Holstein, 67 F. (2d) 780, 781, and the State court erred in refusing to follow that decision and in following prior decisions of the Sixth Circuit Court of Appeals, even though the State court (R. 340) said "It is difficult to reconcile the Holstein case with the cases heretofore cited herein."

## ARGUMENT.

### I.

The plaintiff is not entitled to a recovery under the sole ground charged, that is, that defendants failed to have the Louisville & Nashville car equipped with an efficient handbrake.

The cause of action which the petition purports to allege is that the petitioners here (defendants) failed to perform a duty required of them by the Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission, that is, that they failed to have the L. & N. car 12670 equipped with an efficient handbrake. The right to recover in this suit is based solely upon that allegation. The plaintiff has no right to recover on any other ground. The answer of the defendants denied the allegation that it was their duty to equip the L. & N. car, which had been delivered to them only about an hour before the accident, which was the specific and the only charge they were called upon to meet.

In Jenkins v. Kurn, . . . . U. S. . . . . , No. 732, decided May 5, 1941, this Court, in reversing a judgment of the Supreme Court of Missouri, held that the plaintiff (the petitioner) was required to prove the allegations of his complaint on which he sought to recover.

The Court said:

> "To be sure petitioner was required by the allegations of his complaint to prove that he acted promptly and reasonably to awaken the engineer to the danger ahead. * * * petitioner was compelled also to prove that the notice was communicated to the engineer."

In Stark Brothers Nurseries & Orchards Co. v. Stark, 255 U. S. 50, the petitioner sued for infringement of a trade mark registered under the Act of Congress. The Court said:

> "The district found infringement and unfair competition, granted an injunction, and made a decree for an account of profits from March 11, 1914, when the infringement began, limiting the damages, however, to those suffered after August 26, 1916, that being the date when the plaintiff gave the defendant notice of the registration of the trademark. The Circuit Court of Appeals concurred with the District Court as to the facts, but limited the account as well as the damages to the date when notice was given of the registered mark, a few days before the bringing of this suit. * * *."

The Court quoted the provision of the Act requiring giving of notice, and said:

> "The infringement that is sued for is infringement of a registered trademark, not infringement of a trademark. That is the plain meaning of the above words and the necessary scope of this suit * * *. It seems very plain that the plaintiff had a cause of action outside the statute * * *. The statute above gave the right to come into this Court of the United States. Coming in to assert its statutory rights, we will assume in the plaintiff's favor that it could recover for unfair competition that was irreparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source.
>
> "The plaintiff argues that a notice of March 11, 1914, calling on defendants to discontinue the unfair competition * * * ought to lead to a different result, and the district judge seems to have had a similar notion. But that is to forget the origin and necessary limit of the jurisdiction in this case."

The State Supreme Court in its opinion entirely overlooked the fact that the petition **does not** allege that plaintiff was injured as the result of defendants **hauling** the L. & N. car, but alleges as the **sole** ground of recovery that his injuries "directly and proximately resulted from defendants' **failure** to perform their duty * * * **to have said box car equipped** with an efficient handbrake" (R. 3).

The Supreme Court of Missouri has held in numerous cases that the plaintiff is bound by his pleading and cannot recover on one theory when he has pleaded another, even though he might have been entitled to recover on such theory if he had based his right to recover by such theory.

Davis v. Chicago & E. I. Ry. Co., 338 Mo. 1248, 94 S. W. (2d) 370.

Grieseking v. Litchfield & M. Ry. Co., 339 Mo. 1, 94 S. W. (2d) 375, 377.

The state courts erred in ruling that the plaintiff was entitled to plead one right of action and recover on another. St. Louis, Iron Mountain & Southern R. Co. v. Mc Whirter, 229 U. S. 265, loc. cit. 275; Brinkmeier v. Missouri Pac. Ry. Co. 224 U. S. 268.

II.

The state court erroneously ruled that the plaintiff was entitled to recover although the handbrake was not defective and thereby erroneously interpreted and applied the provisions of the Federal Safety Appliance Act relating to handbrakes, approved April 14, 1910, Sections 11 to 15, inclusive, of Chapter 1 of Title 45, United States Code. Congress provided and required that liability for violation of the Act was conditioned upon proof and

finding that the equipment alleged to have caused the injury was defective at the time.

The state court erred in approving the statement made by counsel for the plaintiff on voir dire examination of the jury, to-wit: "We are not required to prove any defect; we simply prove it didn't operate" (R. 9), and by the giving of plaintiff's instruction number one which authorized the jury to return a verdict for plaintiff without requiring a finding from the evidence that the handbrake equipment was defective (R. 315, 316).

Chapter 1, Title 45, is a combination of a number of different Safety Appliance Acts.

The provisions of the Act of April 14, 1910, are now contained in Sections 11, 12, 13, 14 and 15 of Chapter 1, Title 45, United States Code. Sections 1 to 7, inclusive, of said Chapter 1, Title 45, were found in the Act of March 2, 1893, the first of the Safety Appliance Acts, which required cars to be equipped with power or train brakes, "couplers coupling automatically by impact," and "secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Section 6 of the Act of March 3, 1893, now Section 6 of said Chapter 1, Title 45, provided specifically for the enforcement of the provisions of those sections.

Sections 8, 9 and 10 of said Chapter 1, were Sections 1, 2 and 3 of the Act of March 2, 1903, 32 Stat. 943, and extended the provisions of the Act of March 2, 1893, "relating to train brakes, automatic couplers, grab irons, and the height of draw bars" to all trains and cars, and authorized the Interstate Commerce Commission to increase the percentage of cars in a train required to be equipped with train brakes. Section 10 of Chapter 1, Title 45, expressly provided that nothing in Sections 8

and 9 of this chapter should relieve any common carrier or the Interstate Commerce Commission from any of the duties or liabilities set out in the preceding sections of that chapter.

Sections 11, 12, 13, 14 and 15 of said Chapter 1, Title 45, contain the provisions of the Act of April 14, 1910, relating to and requiring sill steps, handbrakes, ladders and running boards.

Section 12 of Chapter 1 (Section 3 of the Act of April 14, 1910) provides that "The number, dimensions, location, and manner of application of the appliances provided for by Sections 4 (requiring grab irons or handholds) and 11 (requiring sill steps, handbrakes, ladders and running boards) of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this chapter. * * *." This Section 12 then specifically authorizes the Interstate Commerce Commission to change and prescribe the height of drawbars.

Section 13 of said Chapter 1, Title 45, provides:

> "Any common carrier subject to this chapter using, hauling or permitting to be used or hauled on its line, any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100.00 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, That where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become **defective** or

insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be **defective** or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is **defective** or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of **defective** cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such **defective** cars contain livestock or 'perishable' freight. (Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299.)"

Section 14 of Chapter 1, Title 45, is as follows:

"Except that, within the limits specified in the **preceding section** of this chapter **the movement of a car with defective or insecure equipment** may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12, and 13 of this chapter shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply." (Emphasis added.)

It is the contention and belief of these petitioners that the plain language of the Statute requires the holding, and the clear intention of the Congress is disclosed, that liability for injury to an employee does not arise unless and until it is shown that the appliance was in fact defective.

In Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, loc. cit. 275, this Court said:

> "As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied'." (Citing cases.)

In White v. United States, 305 U. S. 281, the Court, at page 292, said:

> "It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax suit more than in any other where the rights of suitors turn on the construction of a statute, and it is our duty to decide what that construction fairly should be."

In McDonald v. Thompson, 305 U. S. 263, this Court rejected the definition of a term in the Federal Motor Carrier Act contended for by one of the parties, and said:

> "That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. D. Ginsberg & Sons v. Papkin, 285 U. S. 204, 208; Ex parte Public Nat. Bank, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words."

In United States v. Dickerson, 310 U. S. 554, this Court, at page 561, said:

> "* * * The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

In Lewis-Sutherland Statutory Construction, vol. 2, paragraph 390, it is said:

> "As a general rule, the words of a statute are to be taken in their ordinary sense, unless it plainly appears from the context or otherwise that they were used in a different sense * * *."

We called attention to the fact that the first Federal Safety Appliance Act was the Act of March 2, 1893 (now 45 U. S. Code, sec. 1-7), requiring that cars be equipped with automatic couplers. That provision (now Sec. 2, 45 U. S. C.) has probably been the basis of more suits and decisions than any other portion of the Safety Appliance Acts. It is very different from the Act of April 14, 1910 (Sec. 11, 45 U. S. C.), which for the first time, 17 years after the Automatic Coupler Law was enacted, required carriers to have cars equipped with "efficient handbrakes."

The automatic coupler law specifically states what is required to comply with the law, and just what omission on the part of a carrier constitutes a failure to comply with the law. It provides that it shall be unlawful to use cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." That statute states what is required so plainly that there was no room nor necessity for an interpretation of the statute and the courts have held that if a car was not equipped with couplers, which coupled automatically by impact, the

law was violated and the carrier was liable for an injury resulting from the use of a car which was not so equipped. The trend of the decisions under the Federal Safety Appliance Acts has had its origin in the decisions applying the unrestricted requirements of the Automatic Coupler Law. In view of this unquestionable fact, it is important we believe that the handbrake Act (45 U. S. C. secs. 11-15) be examined and interpreted in this case in the light of its provisions and the accepted rule of statutory construction.

In Section 4 of the Act of April 14, 1910, Congress used the word "defective" **five times** in stating the conditions under which a carrier would or would not be liable for using a car which was not equipped with the kind of a handbrake which Congress intended when in Section 2 of the same Act it said that cars must be equipped with efficient handbrakes. The context as contained in Sections 4 and 5 of the Act (45 U. S. C. Secs. 13, 14) certainly shows that when the Congress required that cars be equipped with efficient handbrakes, it only meant handbrakes that were **not defective or insecure.**

Petitioners therefore believe that what the courts have said in automatic coupler cases about handbrakes should be treated as obiter dictum, and that the decisions in handbrake cases which are based upon the decisions in automatic coupler cases, should be disregarded. Petitioners believe that this question now squarely presented, should be decided by this Court in this case, whether the plaintiff is entitled to recover, when he failed to allege and prove and the jury was not required to find that the handbrake was defective on this L. & N. car, which had been in defendants' possession less than an hour.

The fact that the courts have heretofore failed to properly interpret and apply the plain provisions of the Safety Appliance Act relating to handbrakes and have failed to

distinguish between that Act and the Automatic Coupler Law is clearly presented in this case and petitioners believe that this Court should review the decision of the State court in this case and now make that distinction and hold that the decisions in the Automatic Coupler cases are not applicable to this case.

III.

The plaintiff based his right to recover on alleged failure of defendants to perform their duty under the orders, rules and regulations of the Interstate Commerce Commission, but failed to prove that the brake equipment did not comply with the standards prescribed by the Commission and for that reason he is not entitled to recover in this suit.

The plaintiff is bound by the allegation of his petition that his injury proximately resulted from failure of the defendants to comply with the orders, rules and regulations of the Interstate Commerce Commission in that defendants failed to have the L. & N. car equipped with a handbrake conforming to the specifications required by the Commission.

The plaintiff alleged in his petition that the defendants failed to comply with the orders, rules and regulations of the Commission, and he must prove before he can recover the particulars in which the defendants failed to comply with such orders, rules and regulations and having failed to so prove this allegation he is not entitled to recover. The courts will assume that carriers have complied with the requirements of the law and of the orders, rules and regulations of the Interstate Commerce Commission.

## IV.

The State court erred in holding that although plaintiff based his suit on the Federal Employers' Liability Act, he was entitled to have the judgment affirmed, even though he failed to allege or prove and the jury was not required to find that his injury resulted from negligence of the petitioners' agents or employees or from a defect in the Louisville & Nashville car, due to their negligence.

The plaintiff bases his right to recover in this action on the Federal Employers' Liability Act (R. 2, 3, 12, 16, 77). That Act (Sec. 51, Title 45, United States Code) makes a common carrier liable to an employee who is injured while engaged in interstate transportation for an injury "resulting in whole or in part from the **negligence** of any of the officers, agents or employees of such carrier **or** by reason of any **defect or insufficiency, due to its negligence** in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis ours.)

There is nothing in the Act which in any way changes or modifies the provision, limitation or restriction that the carrier is liable **only** in case there is **negligence.** There can be no recovery if the employee fails to allege and prove that his injury resulted "in whole or in part from the **negligence** of any of the officers, agents or employees of such carrier, or by reason of any **defect or insufficiency due to its negligence,** in its cars * * *."

The Federal Employers' Liability Act gave the plaintiff as an employee of the petitioners a right of action for an injury resulting from the **negligence** of any of the officers, agents, or employees of the receivers, or for an injury resulting from **any defect or insufficiency,** due to **their negligence,** in **their** cars.

The Act of April 14, 1910, is the only Act of Congress dealing with the subject of handbrakes and the Act

should be considered and applied as an entirety and the intention of Congress should be viewed and determined from the Act as a whole. When so viewed, and considered, it is unmistakably apparent that Congress did not intend to make a carrier liable except when the plaintiff alleged and proved and the jury under the instructions found that the handbrake was defective. In this case the plaintiff not only failed to allege in his petition and prove by the evidence that the handbrake was defective, but expressly claimed and the Court below specifically ruled that it was not necessary for plaintiff to allege or prove that there was any defect in the handbrake, and that he was only required to prove that it did not operate (R. 9, 315).

The fact that the Congress uses the term "defect" or "defective" five times in Section 4 and once in Section 5 of the Act in describing the conditions and circumstances under which a carrier would be held to have failed to comply with the requirements of the Act, shows that a carrier would not be liable except when it was alleged and proved that the handbrake was defective.

The Act of April 14, 1910, should be considered in its entirety, and when so considered, it shows that the Congress intended that the defendants below, the petitioners here, should not be held liable for failure of the owner of the car, Louisville & Nashville Railroad Company, to equip the car with a handbrake as specified in the Act. The petition of the plaintiff alleges and bases his right to recover only upon the failure of the defendants below, the petitioners here, to **equip** the car with a handbrake as required by the Act and the rules and orders of the Interstate Commerce Commission.

In New York Central R. Co. v. Ambrose, 280 U. S. 486, which was an action under the Federal Employers' Lia-

bility Act, as is the case at bar, this Court, at page 489, said:

> "We are of opinion that there must be a reversal because the evidence fails to establish negligence on the part of the railroad company."

In the same case, at the same page, the Court said:

> "In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and cannot be allowed to stand (citing case).
>
> "The utmost that can be said is that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See Patton v. Texas & P. R. Co., 179 U. S. 658, where, at page 663, this Court said:
>
> " 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * *'."

In Jamison v. Encarnacion, 281 U. S. 635, this Court, at page 640, said:

> "The Federal Employers' Liability Act does not create liability without fault."

The plaintiff could not maintain this action for damages except under the provisions of the Federal Employers' Liability Act, and it is upon that Act that the plaintiff bases his right to recover in this action (R. 2, 3, 12, 16, 77). That Act provides that a common carrier shall be liable to an employee for an injury received

while engaged in interstate transportation "resulting in whole or in part from the **negligence** of any of the officers, agents, or employees of such carrier **or by reason of any defect or insufficiency due to its negligence** in its cars, * * *" (emphasis ours).

The plaintiff failed to allege and prove that his injury resulted from the negligence of any of the agents or employees of the defendants, or by reason of any defect or insufficiency due to their negligence in the Louisville and Nashville car No. 12670.

The State Court erroneously allowed the plaintiff to recover and affirmed the judgment of the Circuit Court although the plaintiff failed to allege and prove that he was injured as the result of any negligence on the part of any agent or employee of the defendants or by reason of any defect or insufficiency due to their negligence in the car in question.

The suit being under the Federal Employers' Liability Law, and the plaintiff having failed to allege and prove that he was injured as the result of negligence of the agents of these defendants or by reason of any defect or insufficiency in the car, he is not entitled to recover in this case and the state court erroneously disregarded and failed to apply the provisions of the Federal statute on which the action is based and the judgment should be reviewed by this Court on this ground.

## V.

The state court erred in holding that it should disregard the latest ruling of the federal court.

It was the duty of the state courts to follow and apply the latest ruling and decision of the federal courts in construing and applying the federal law, the Federal

Safety Appliance Act of April 14, 1910. The state courts had no right to disregard the latest ruling of the federal court in Grand Trunk R. Co. v. Holstein, 61 F. (2d) 780, on the theory or assumption that the court of appeals in that case did not believe the plaintiff's testimony on the trial because he had made a different statement before the trial.

In Weaver v. Mobile & Ohio R. Co., 120 S. W. (2d) 1105, the Supreme Court of Missouri en banc clearly recognizes the rule that the decisions of the federal courts should be followed, and at page 1109 said:

> "As this action is under the Federal Employers' Liability Act, the test announced by the decisions of our federal courts in ruling the sufficiency of the evidence on a motion for a directed verdict is to be followed."

The right to recover depends upon the Act of Congress, and the principles administered in the federal courts. Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 509; Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, 41; Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, loc. cit. 491.

The Supreme Court of Missouri seems to base its decision largely upon the case of Henry v. Cleveland, C., C. & St. L. Ry. Co., 332 Mo. 1072 (61 S. W. [2d] 340). The opinion in that case, quoted from the petition in the case which alleged that car on which the employee was working "was not equipped with a secure and efficient handbrake," but it did not charge the carrier in that case with liability on the ground that it did not equip the car with an efficient handbrake, and did not base a right to recover on that ground, as the plaintiff Wild has done in this case. In that case the plaintiff alleged and based the right to recover on the charge that defendant hauled a car on its lines

which did not comply with the statute in that the handbrake was so defective, insecure and inefficient that "either the handbrake chain broke," or "was so insecure and inefficient * * *that it became disconnected in such manner as to cause the deceased to fall * * * when he attempted to use same, * * *."

The Court in that case quoted the provision of the Safety Appliance Act under which that suit was brought that "it shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line any car" not equipped as provided in the Act.

The Court then said that Act imposed the duty upon the carrier to equip **its** cars with efficient handbrakes. The Court did not say in that case or in any case that it is the duty of a carrier **to equip the car of another carrier** with efficient handbrake, or that an employee might recover from his employer on the ground that it had not equipped the car of another carrier with such handbrake, as the plaintiff Wild alleged and was allowed to recover in this case.

In the Henry case, relied upon by the Missouri Supreme Court in this case, the Court cites several federal cases in support of its holding. In Philadelphia & R. Railroad Co. v. Eisenhart (C. C. A.), 280 F. 271, 276, the plaintiff was injured by reason of a defective coupler. The Automatic Coupler Act of March 2, 1893, required that cars must be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars. The Circuit Court of Appeals in that case, at page 276, said:

> "The defendant might have asked in the terms of the point, for an instruction to the jury that if they

> believed under all the evidence that the couplers 'were in proper condition of **construction and repair,** capable of coupling automatically by impact in the manner required by the Safety Appliance Act, then (they) might find that the defendant had performed its duty'. This would have been an instruction on the absolute duty of the carrier to conform to the Act." (Emphasis added.)

The Court in that case said the Act "imposes an absolute duty upon the carrier to keep **its couplers** in a condition of **construction and repair** to meet the safety requirements of its provisions." (Emphasis added.)

In that case the Circuit Court of Appeals (page 275), said:

> "As the whole controversy had revolved around the question whether the couplers at the place where they parted were **defective,** we think the charge was proper if warranted by the evidence."

The question submitted was whether the cause of the injury was the **"defective coupling."** The Court said one witness testified that there was lost motion in the coupler parts which explained their action. The Court then said: "This was testimony of a **defect.** We think it was admissible." (Emphasis added.) The Court also said that "the verdict should be sustained on the inference of the defendant's **negligence** to be drawn from the mere opening of the couplers." (Emphasis added.)

In Lehigh Valley R. Co. v. Howell, 6 F. (2d) 784, the Circuit Court of Appeals quoted the provision of the Safety Appliance Act making it "unlawful for any common carrier * * * to haul or permit to be hauled or used * * * any car * * * not equipped * * * with efficient handbrake."

The Court said this "obligation was absolute and mandatory," and then said: "That the brake was **defective** is abundantly established, if not admitted" (emphasis added). The Court, referring to the defective condition of the brake, fully established by the evidence, said, 'when it failed **because of its defect,** it proved to be inefficient" (emphasis added).

The Court referred to the case of Davis v. Wolfe, 263 U. S. 239, in which the plaintiff's injury was caused by a grab iron which "was **defective,**" and quoted from that decision in which this Court said, "there was substantial evidence tending to show that the **defective condition** of the grab iron * * * was a proximate cause of the accident, * * * " (emphasis added).

The Circuit Court of Appeals then referred to a prior decision "where the plaintiff was injured by a **defective** coupling."

In Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, loc. cit. 40, the Court said:

> "Plaintiff's injury was directly attributable to a **defect** in an appliance, which, by the 1910 amendment, was required to be secure, and **the Act must therefore be deemed to create a liability** * * * " (emphasis added).

In Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, cited in the Henry case, the Court (page 504) said that

> "in the light of the issues, the evidence, and the charge, it is evident, we repeat, that the jury must have found that the **defective** air brakes were a proximate cause of the collision."

The Court, at page 505, also said:

> "It is, of course, settled, that **if** the equipment was in fact **defective** or out of repair, the question whether this was attributable to the company's negligence is immaterial" (emphasis added).

In the same case this Court also said:

> "* * * The air-brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some **defect or want of repair** in the valves or packing."

In San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, l. c. 482, this Court said:

> "There was sufficient evidence to warrant the jury in finding that the coupler upon the box car or that upon the engine, or both, were in **bad repair,** and that for this reason they did not measure up to the standard prescribed by the Act of March 2, 1893, for such equipment" (emphasis added).

In the case of Didinger v. Pennsylvania R. Co., 39 F. (2d) 798, which the State Court relies upon, the Circuit Court of Appeals states the very pertinent proposition, which the petitioners believe authorizes a review of the judgment in this case. The Court in that case said it was "distinguishable from Burnett v. Pennsylvania R. Co., 33 F. (2d) 576 (C. C. A. 6), for there the happening of the accident **was not, as here, consistent only with the hypothesis of the existence of some defect. There the proofs were 'at least equally consistent with the existence of some other effective cause' than defect or insufficiency.**" (Emphasis ours.)

In this case, as in the Burnett case, the happening of

the accident was not consistent only with the hypothesis of some defect, for in the case at bar, as in the Burnett case, the **proofs were** at least equally consistent with the existence of some other effective cause than defect or inefficiency. That fact cannot be fairly contradicted or counteracted for the reason plaintiff proved that a bolt or nut or stone getting between the brake shoe and the rim of a car wheel, and that flat places on a wheel, would cause the brake to jerk and vibrate (R. 306, 308, 310).

The petitioners believe that the Supreme Court of Missouri erred in refusing to follow the ruling in latest decisions of the Federal Court, especially as stated in the Holstein case and in the Didinger case, and that on this ground this Court should grant the writ and review the judgment and decision of the State Court.

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## CONCLUSION.

The petitioners believe that the decision of the Supreme Court of Missouri is erroneous in each and all of the particulars stated in the Specifications of Error and in the petition for certiorari, that the decision should be reviewed by this Court and that in the exercise of sound judicial discretion the writ of certiorari to review the judgment of the State Court should be issued.

Respectfully submitted,

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